MISCELLANY.

William Wirt.—William Wirt was a native of Westmoreland County and when twenty-one years of age he moved to Fredericksburg where for several years he engaged in the practice of law.

After practicing his profession for a few years in Fredericksburg, he moved to Charlottesville, where he married his first wife, a Miss Gilmer, of Pen Park. He practiced law in Charlottesville, but on the death of his wife he moved to Richmond where he soon reached a place in the front rank of the bar where there were such lawyers as Williams Wickham, Littleton Waller Tazewell, and Benjamin Watkins Leigh.

In danger of falling into a fatal habit in early life he retrieved himself from the brink of the abyss by an act of her who afterwards became his admired and beloved second wife. While lying in a state of intoxication on a pavement in the city of Richmond this lady passed by and threw over his face her handkerchief with her initials written on it. When he awoke and recognized the initials he was so much mortified that he resolved to pause in his downward course and for the future lead a sober and respectable life.

He rose to eminence not only at the Richmond bar but also at the bar of the United States Supreme Court. He died during the session of the Supreme Court, and at the bar meeting that adopted resolutions of respect to his memory Daniel Webster paid a tribute to him in which he said in part: He has this day closed a professional career among the longest and most brilliant which the most distinguished members of the profession have at any time accomplished. As a public man it is not our duty to speak of him here, and if we were to speak of him in his private life and in his social relations, all that we could possibly say of his urbanity, his kindness, and the warmth of his affections, would hardly seem sufficiently strong and glowing to do him justice in the feelings of those who separated now forever from his embraces can only enshrine his memory in their bleeding hearts. Let us then hasten to pay to his memory the well-deserved tribute of our respect; let us lose no time in testifying our sense of our loss, and in expressing our grief that one great light of our profession is extinguished forever.

L. S. MARYE.

Charlottesville, Va.

What Is a Successful Lawyer?—At the recent Annual Meeting of the Illinois Bar Association, a contest was held for the best definition of a successful Lawyer.

First prize was won by Charles J. O'Connor of Chicago, whose definition was "one who masters his case, who gives a fair share of

his surplus time to the advancement of jurisprudence, who performs his full duty of citizenship, and who is honest with court, client, opposing counsel and himself."

E. E. Donnelly of Bloomington, was winner of the second prize with the definition: "One thoroughly qualified, diligently and ethically practicing law as an honorable profession, not to acquire wealth; standing for the highest ideals of humanity and government."

Dean H. W. Ballantine of Urbana, won the third prize by defining the successful lawyer as "One who well serves the legitimate interests of his clients, aids the work of the courts and makes himself useful to the community."

Among the many definitions submitted were the following:

"An attorney, with 10% Personality, 5% Acquaintance, 10% Tenacity, 25% Ambition, 50% Ability, 100% Successful. Total, a lawyer."

"One who honestly represents the rights of his client."

"A successful Illinois lawyer is one who has always been true to that spark of celestial fire within his breast, which men call conscience."

"The Lawyer who never violates the highest ideals of right and completely conserves the same for his client so far as possible."

"An Illinois lawyer who maintains his self-respect, conserves the best interests of his clients and makes a comfortable living from his practice is successful."

"One who enjoys the confidence and respect of the Bench and Bar and who inspires his clients with his ability and integrity."

"One whose steadfast loyalty to the State, the law, the court and the client remains unquestioned."

"A just, diligent and methodical patriot, learned in the law, who, for hire, advises clients to maintain right relations toward man and the State."

"One who satisfies his clients and the courts but never himself."

"One who donates all his faculties to his profession and always preserves his self-respect."

"One who obtains a good knowledge of the law by honest treatment of his clients, obtains their confidence, and is elected to the Supreme Bench.

"One who knows what the law is when he reads it."

"An honest, prompt, pains-taking, careful, tactful, studious, intelligent, persevering, courageous and level-headed lawyer, who knows his business and faithfully serves his client."

"One who has pursued his profession without wavering from its highest ideals."

"One who having ability and leadership, vigorously defends right and opposes wrong in the private affairs of his clients and public affairs of his community."

"One who attends to his own business as well as that of his client."

"One who observes every rule of professional ethics and succeeds."

"A successful Illinois lawyer is one who enjoys the esteem and confidence of his clients, the Courts and his fellow men."

"A successful Illinois lawyer represents his client as an advocate, not as a judge, and permits neither hope of reward nor fear of popular disapproval to swerve him from his line of duty."—Quarterly Bulletin.

Civic Proverbs.—"Enforce the law, and if the law be bad, repeal it, not ignore it."

"Disregard of one law breeds disrespect for all law. In allowing some laws to go unenforced we reap a harvest in having all laws broken."

"Good men will observe even bad laws, but bad men will break even good laws. It should be that all men, good and bad, be compelled to keep all law, good and bad, because it is the law."

"The patriotism of peace is just as necessary as the patriotism of war. The patriotism of the ballot is even more necessary in a free country than the patriotism of the bullet."

"Plenty of men will die for their country, but the man who will live for his city and state every day is the man the government needs."

"The official who sells his vote is a traitor of peace, more dangerous than traitors of war."

"The government never neglects the people unless the people first neglect the government."

"No government, city, state or national, was ever better than the people made it, or worse than they suffered it to become."

"Good citizens make good laws, but no law can make good citizens."

"States and cities do not consist of mortar and brick and stone, but the character of their citizenship".—Ex.

"Grass" Widows.—Ashley *v.* Dalton, 81 So. 488, which was an action for breach of promise of marriage, the Supreme Court of Mississippi makes the following contribution to the literature relating to "grass" widows: "It would perhaps be useless to offer suggestion or counsel to a man of the age of appellant, or to lay down any proposition that would carry caution to the mind of people of his age and class, especially when it comes from his junior in years if not in wisdom. Yet it might be proper to remind others of his type that he who would trip the light fantastic toe with the terpsichorean maid must contribute coin to the man who extracts mystic music from the violin strings, or, in other words, that pleasure must be paid

for with the coin of the realm; and to remind them of the truth expressed by a minor poet when he said:

'When of "dough" we get a batch,
The women make us toe the scratch,
And he who courts and does not wed,
She will pull his leg in court instead.'

Beware of the grass widow when her eyes beam love and the shades are down low. She hypnotizes the reason, and the soul escapes the prison bars of discretion, and 'you float airily on golden clouds to rosy lands of pleasure and joy.' Temporary bliss reigns surpeme in the palace of love but in the end it creates mournful memories, heartache, remorse of conscience, and a burning desire to 'blot out the past.'"

"Concurrent Jurisdiction" Not the Same as "Concurrent Power." —In Law Notes of August is found an article by Mr. Bronaugh, in which he points out problems which will arise under article 2 of the 18th amendment. Unfortunately for his contention, he bases them upon a misstatement of the contents of section 2.

He says that section 2 of the 18th amendment provides that, "The Congress and the several states shall have concurrent *jurisdiction* to enforce this article by appropriate legislation."

This is not the wording of section 2. This section provides that Congress and the states shall have *concurrent power* to enforce this article by appropriate legislation. "Concurrent power" and "concurrent jurisdiction" do not mean the same thing.

His argument is based entirely upon the decisions relating to concurrent jurisdiction and is not in point. He relies mainly on the Oregon case 212 U. S. 315. In this case the two states were given concurrent jurisdiction over the river. Oregon passed a law prohibiting purse nets. Washington enacted a law licensing persons to do the thing which the Oregon legislature prohibited. Oregon demanded the arrest of a citizen operating a purse net in the state of Washington. The court simply held that Oregon could not enact a law to apply to a citizen of another state when he was in that state and not violating the laws of that state. If the state of Oregon had the legislative power to enact a law for both of these states, just as the federal government has the power to enact a law to apply to all of the states, and then Oregon had been denied power to enforce the law in Washington, the case would be in point.

The reason why the operator of a purse net could not be convicted in Washington was because there was no law in effect in the state of Washington that he was violating. When Congress enacts a law, it applies to all of the states, and any person who violates it cannot

set up the defense that there is no law prohibiting the act which he was doing in that particular jurisdiction.

The opponents of prohibition are mistaken when they claim that the 18th amendment cannot be enforced until the state and federal government enact identically the same laws on this subject matter, and that concurrent power means joint action or exactly the same action on the issue involved. The friends of the 18th amendment insist that concurrent power simply means equal power or authority on the part of the state and federal government to enact prohibition legislation and that the use or failure to use this power by one does not prevent the other unit of government from using its full power or part of its power to carry out the manifest purpose of the 18th amendment.

What Is Power?—Power is simply the right, ability or the authority to do something. In constitutional law, power is simply the right to take action in respect to a particular matter. The power referred to in this amendment is the governmental power to enact legislation to enforce the prohibition amendment.

What Does Concurrent Mean?—In the long line of decisions the word "concurrent" has been construed to mean the following: "Contributing to the same event or effect;" "coöperation;" "seeking the same objects." These and many other similar constructions make it clear that the two units of government are given authority or power to carry out the purpose of the 18th amendment. There is no limitation on this power except that these units of government only use that authority in harmony with the purpose of the 18th amendment.

There is nothing in the 18th amendment to require concurrent legislation to be enacted. It simply confers concurrent power upon the state and federal government. There is a vast difference between two units of government having power to do a thing and making the enforcement of a constitutional provision contingent upon the state and federal government enacting concurrent legislation.

How the Amendment Will Be Enforced.—Congress, having the power as well as the obligation to enact legislation to enforce the amendment, will doubtless prohibit the manufacture and sale of intoxicating liquor for beverage purposes and place the obligation upon the federal courts to enforce the prohibition acts and outline the procedure for its enforcement. It is pointed out by the opponents of prohibition that this policy will result in a conflict between the federal and state laws, and that concurrent power under such a condition is impossible. The constitution must be construed together. Article six of the constitution was not amended or repealed by the 18th amendment. It says: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the superior law of the land and the Judges in every

state shall be bound thereby; anything in the Constitution or the laws of any state to the contrary notwithstanding."

The Supreme Court in construing this has said: "It must always be borne in mind that the Constitution and laws of the United States are as much a part of the law of every state as its own local laws and Constitution." This power of the federal government over the state government was recently illustrated in the West Virginia case decided by the Supreme Court in January, 1919. The court said: "When Congress exerts its authority in a matter within its control, state laws must give sway in view of the regulation of the subject matter by the Superior power conferred by the Constitution."

While the state is given equal power within its jurisdiction to enact laws prohibiting the liquor traffic, if it does not use that power to the full extent this will not prevent the federal government from carrying out the full purpose of the 18th amendment as authorized in the constitution. Each unit of government will accept final jurisdiction of cases which are prosecuted under laws enacted by it. There will be no more conflict than there is now between offenses on the same subject matter which are defined by the federal and state government. There are varying and even conflicting standards between the state and federal laws as to what is intoxicating liquor, adulterated foods, drugs, etc. A citizen of a state who is inclined to break these laws will have to inform himself as to the provisions of both federal and state enactments and conform to both. The 18th amendment notifies him that the beverage liquor traffic is prohibited and there is no limit on the power of the state or federal legislative bodies in passing laws which have a reasonable relation to the end authorized. The federal courts enforce the federal acts. The state courts will have at least as much authority to make arrests and help to enforce this federal law as any other federal law. See sec. 1014 R. S.

The state courts, with the larger number of officers and more adequate enforcement machinery, will enforce the laws enacted by the states in order to make prohibition effective within their borders. When a state and a municipality have concurrent power to prohibit the liquor traffic, each enacts its own laws. The municipality enforces its own laws within the municipality. The state enforces its state law not only in the municipality but throughout the the entire territory within its jurisdiction. Many states give not only concurrent power to the municipal council and the state legislature to prohibit the sale of liquor but they confer concurrent jurisdiction on city, township, county and district courts to enforce the law. The court which accepts jurisdiction first has exclusive jurisdiction of that case, but this does not prevent other courts from authorizing arrests of the same defendant for other offenses. Concurrent power causes no confusion or conflict. It will simply result in harmony of

action between the two governments and makes law enforcement sure. The federal government may establish additional courts or confer additional authority on judicial officers to enforce the prohibition act if it becomes necessary, just as state officers have this authority conferred upon them by state law.—Wayne B. Wheeler in Law Notes.

Lawsuit Lasted 478 Years.—A lawsuit regarding Rhodesian mining rights, which has reached the House of Lords in its fourth year, is quite a legal infant when compared with some that have preceded it.

The Thelluson will case, for example, dragged out in the courts from 1797 to 1857. Another similar action at law, known as the Bishop-Demetra will case, lasted 122 years.

Even this, however, is not a record; for in 1908 there was settled at Friemar a lawsuit that had been in progress since 1430. The raising of a dam was the point at issue, and it occupied the courts for exactly 478 years.—Tid-Bits.

Is the Life Tenant or Remainderman of Stock Entitled to Extraordinary Cash or Stock Dividends?[1]—The question whether a life tenant or remainderman is entitled to extraordinary cash or stock dividends is a matter of the utmost importance under modern business conditions. Large corporate holdings are daily bequeathed by will and it is out of the creation of trust estates by will that the situation under consideration arises necessitating the intervention of the Courts.

All jurisdictions are agreed that the conflicting claims of life tenant and remainderman to an extraordinary dividend rest on the intention of the testator as indicated in the trust instrument. But it is in the absence of definite language disposing of extraordinary dividends that the matter is presented for judicial determination. Phraseology which directs the payment to a specified person during his life of "income," "dividends," "interest, dividends and income," and words of similar import bring before the Court the query whether the trustee shall credit an extraordinary dividend to the life tenant or remainderman. No such question occurs in connection with ordinary dividends which are deemed to have been earned as of the date of their declaration, and become property of the holder of the stock at that time.

An ordinary dividend, it may be noted, is distinguished from one of an extraordinary nature in that the former "is periodically declared and distributed among the shareholders of the corporation while the latter is declared and distributed at irregular intervals out of accumulated profits. The length of time during which the direct-

1. 12 L. R. A. N. S-768 and note; 35 L. R. A. N. S. S-563 and note; 50 L. R. A. N. S-510 and note; L. R. A. 1916, D-210, and note.

ors have allowed profits to accumulate, however, before declaring the dividend affords no satisfactory test as to its nature, as ordinary dividends are sometimes declared out of accumulated profits, and extraordinary ones out of profits recently earned."[2]

The conflict in the authorities relative to the disposition of extraordinary dividends is confined to earnings past or current—a dividend which reduces corporate capital, or which arises from an advance in its value due to reasons other than an accumulation of profits, belongs indisputably to the corpus of the estate.

The first rule formulated on the matter of the ownership of extraordinary dividends was the early English rule,[3] now obsolete, which gave all extraordinary cash or stock dividends to the remainderman as a part of the co pus of the trust fund.

The inconvenience of investigating the corporation's books and the practical ease with which this rule was applied, seems to have been the cause for its adoption. A cynical commentator, however, attributes its confirmation[4] to the influence brought to bear by the Bank of England, when, to the consternation of its directors, the Court intimidated its intention of going over the bank's records in order to apportion the dividend between the rival claimants.[5] This view of the law, obviously unfair to the life tenant, has been superseded by the later English rule, which is identical with the Massachusetts Supreme Court rule, in holding all stock dividends to be corpus and all cash dividends, income.[6]

The three rules now in force are the Kentucky rule (formerly the New York and Kentucky rule); the Massachusetts-United States Supreme Court rule (sometimes known as the Massachusetts and later English rule); and the Pennsylvania rule.

The Kentucky rule, briefly stated, is this: extraordinary cash divilends, or stock, declared during a life-tenancy out of profits become the property of the life tenant whether such dividends were earned before or after the beginning of his estate.[7]

It will be observed that while the early English rule gave all extraordinary dividends to the remainderman, the Kentucky Court swings to the other extreme and holds that such dividends belong to the life tenant as income. This precept rejects as a criterion of distribution either the nature of the dividend, *i. e.*, whether stock or cash, or an apportionment based upon the time when the profits accumulated with reference to the vesting of the life estate.

The leading Kentucky case,[8] in refusing to apply either of the

2. 9 Am. and Eng. Encyclopedia of Law, 710.
3. Brandes *v.* Brandes, 4 Ves. Jr. 800.
4. Irving *v.* Houston, 4 Paton, Sc. App. Cas. 521.
5. 12 L. R. A. N. S. 775.
6. Bouch *v.* Sproule L. R. 12, App. Cas. 397.
7. Hite *v.* Hite, 93 Ky. 257; Cox *v.* Gaulbert, 148 Ky. 407.
8. Hite *v.* Hite, 93 Ky. 257.

above tests, says: "The difficulty attending such an inquiry, the impossibility of attaining accuracy, and of ascertaining the many sources from which the profit has been derived, are the reasons for this rule; but it does not also follow that the declaration of the company, as to the character of the dividends, determines its legal status and to whom it shall belong."

Kentucky agrees with Massachusetts as to the impraticability of an apportionment, but, unlike Massachusetts, refuses to let the corporate act in declaring stock or cash determine its owner.

Dicta favoring Kentucky [9] are found in several cases, but we know of no State following Kentucky when the dividends were out of *profits,* which had clearly accumulated, partly before and partly during the life estate.

New York formerly subscribed to the Kentucky doctrine, but in the well-considered case of In re Osborne [10] alligned itself definitely with the apportionment rule promulgated by the Courts of Pennsylvania.

The Pennsylvania rule was first enunciated in the leading case of Earp's Appeal.[11] It is in substance this: The Court, as a criterion for determining the respective rights of life tenant or remainderman, takes into consideration the time in which an extraordinary dividend, either cash or stock, is earned with relation to the beginning of the life estate. If profits have accumulated before the life tenancy commences and a dividend is declared therefrom after its inception, the dividend belongs to the corpus of the estate, since it was not earned during the life estate. By a parity of reasoning all profits earned during the life tenancy belong to the life tenant, and if the profits have accumulated partly before and partly during the life tenancy, the extraordinary dividends, either stock or cash, are divided between remainderman and life tenant, respectively, in proportion to the amount of profits accumulated before and after the life estate's inception.

It will be observed that the Pennsylvania rule rejects the character of the dividend as a basis upon which to determine the rights of the parties and looks entirely to the time of the earning of the dividend as a test.

The Massachusetts-Supreme Court rule is, succinctly stated, "to regard cash dividends, however large as income, and stock dividends,

---

9. Bryan *v.* Aiken, 45 L. R. A. N. S-477; Kalbach *v.* Clark, 133 Iowa 215.

10. In re Osborne, 209 N. Y. 450.

11. Earp's Appeal, 28 Pa. 368; Stokes' Estate, 240 Pa. 277; Re Heaton, L. R. A., 1916, D-201; Miller and Payne, 105 Wis. 354; In re Baldwin, 209 N. Y. 601; Smith's Estate, 140 Pa. 344; In re Osborne, 209 N. Y. 450; Thomas *v.* Gregg, 78 Md. 545; Holbrook *v.* Holbrook, 74 N. H. 201; Ballantine *v.* Young, 79 N. J. Eq. 70; Goodwin *v.* McGaughey, 108 Minn. 248.

however made, as capital."[12] This principle disregards entirely the question of the time in which the profits making up the dividend have accumulated; the *form* of the dividend as declared by the directors of the corporation, acting in good faith, definitely decides its owner.[13]

One of the outstanding cases in this line of decisions is Gibbons *v.* Mahon,[14] which reasons with vigor and clearness, thus: "There fore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such a distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share.

"A stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest." Later in the case is this language: "A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave new evidence of ownership which always existed."

The recent United States Supreme Court case of Towne *v.* Eisner[15] has affirmed Gibbons *v.* Mahan and has quoted it with approval, re-enunciating the doctrine that a stock dividend belongs to the corpus of an estate, and therefore is not taxable as income under the Federal Income Tax.

The reasoning in favor of the Massachusetts rule found in Gibbons *v.* Mahan, *supra,* commends itself at first glance as logically sound, but on close examination appears somewhat casuistic.

Though, as the Court truly says, after a declaration of a stock dividend a shareholder's proportional interest remains the same in the corporate funds, yet those funds, if the dividend is rightfully declared out of profits, have increased to the amount of such dividend, and if the shareholder sell his new shares, by such sale the original investment evidenced by the old shares has not been de-

---

12. Minot *v.* Paine, 99 Mass. 108.

13. Mansfield *v.* Mansfield, 79 Conn. 634; DeKoven *v.* Alsop, 205 Ill. 309; In re Brown, 14 R. I. 371; Billings *v.* Warren, 216 Ill. 281; Hyde *v.* Holmes, 198 Mass. 287; Spooner *v.* Phillips, 16 L. R. A. 461.

14. Gibbons *v.* Mahon, 136 U. S. 549.

15. Towne *v.* Eisner, 62 U. S. L. Ed. 183.

pleted an iota. How, then, can such additional shares be termed anything but income?

The Court says: "The question whether a distribution of earnings among stockholders is an apportionment of additional stock or a division of profits, and income *depends on the substance and intent of the action of the corporation.*" This, then, is the gist of the matter—the corporation rather than the courts becomes the judge of the rights of life tenant and remainderman through an arbitrary ruling that the intention of the testator will thus be effectuated.

It is universally admitted that directors of a corporation, acting for the best interests of the corporation, may declare cash dividends, stock dividends, or no dividends at all, but it does not follow logically that once the dividend is declared, the corporation rather than the law should determine whether it be corpus or income in the dispute between the parties themselves.

It is amusing to observe the conflict between the two theories in the viewpoint of the judges. Take, for example, this language from a decision which upholds the Pennsylvania doctrine,[16] though, as is apparent, with reluctance:

"As a matter of logic, it is difficult to resist the reasoning leading to the conclusion that stock dividends are, in fact, principal; for the life tenant, as is usually held, is not, in the absence of fraud, or improper conduct, entitled to the earnings until they are distributed. They are not, in fact, distributed, but on the contrary, put permanently into capital account when new stock is, without any money equivalent, allotted to the whole body of stockholders."

In contrast we find this expression from a Court following the Massachusetts rule and in reference to it: "It was not pretended that this rule * * * was the ideal rule of reason; nor have the Courts which have given their approval of it ever claimed it to be such, or one which would accomplish exact justice under all circumstances."[17]

The reason given over and over again for the application of the Massachusetts rule is, that by its certainty and ease of application it is more productive of justice in the long run than is a search behind a dividend to discover the equitable demands of each case.

Were the Massachusetts rule always simple to apply and the Pennsylvania rule invariably complex, a sound argument for the former would exist despite its purely arbitrary character, though even this is denied indirectly by the opinion in Goodwin *v.* McGaughey in this phrase: "It may be that it is not always easy to determine when the fund was earned, but that fact alone is not sufficient for refusing to apply the (Pennsylvania) rule."[18]

16. Ballantine *v.* Young, 79 N. J. Eq. 70.
17. Smith *v.* Dana, 77 Conn. 543.
18. Goodwin *v.* McGaughey, 108 Minn. 248.

But it is by no means so simple as it first appears. All Courts following this (Massachusetts) rule hold:

I. That the discretion of the corporation in declaring the dividend will not be binding if done in fraud or bad faith.[19]

II. That the Court will look into a dividend to ascertain whether it is declared out of capital or profits.

III. That the Court will examine a so-called stock or cash dividend to ascertain its true nature and distribute it accordingly, or in other words, "in determining what is a cash dividend and what is a stock dividend, substance and not form is regarded and often it is difficult to decide to which class a particular dividend belongs."[20]

If we stop to consider that the Courts will investigate a dividend's good faith, its source in earnings or capital, and its subsequent nature, there seems small ground for their criticism of the apportionment rule, *i. e.*, that the insuperable difficulty of investigating corporate accounts renders such task uncertain and hence unfair. Since Massachusetts Courts look into the matters hitherto enumerated, they could with equal propriety inquire as to the time in which a dividend was earned.

Another matter to consider in this connection is one frequently overlooked—only in cases involving a *dispute* as to the time of earning does the apportionment rule become complex and unwieldy of application. In any other case the corporation's books alone furnish the requisite information.

The Pennsylvania rule does substantial justice to both parties. Under it, a corporation, even for legitimate business reasons, cannot, by the accumulation of profits before the vesting of the life estate, and the declaration of a cash dividend thereafter, strip the remainderman of all claim thereto. Neither can it turn over the entire income earned during a life tenancy to the remainderman by deciding to keep the profits for further corporate use and issuing for that purpose stock instead of cash dividends.

The interests of both parties are guarded under the Pennsylvania rule and are not dependent on the varying exigencies of business conditions as evidenced by the issue of cash or stock. The principle is occasionally as difficult and unsatisfactory in its application as its opponents allege; but it is based on an equitable attempt at fairness and is theoretically perfect, though, as we know, no rule of law accomplishes perfect justice in every case in which it is applied. Still, the failure of such an equitable test in a few cases would not justify the substitution therefor of an arbitrary rule for purposes of convenience, the results of which may be, and frequently are, more unfair than a faulty apportionment.

The Pennsylvania rule, in fact, to do perfect justice, should go far-

19. Gibbons *v.* Mahan, *supra.*
20. Lyman *v.* Pratt, 13 Mass. 58.

ther and apply the time-of-earning test to the termination of the life tenancy and the beginning of the remainderman's estate. The present rule, by the great weight of authority under all methods of determining the rights of the parties at the close of the life tenancy, is to give to the remainderman, as though it were an ordinary dividend, any extraordinary dividend declared after the vesting of his estate, regardless of whether it was earned before such period or subsequent to it.

The concluding argument for the Pennsylvania rule is a matter of human experience. It is a reasonable supposition when a testator, in creating a trust, gives "income for life" without mentioning extraordinary dividends, that he regards his entire corporate holdings at the time of his death as principal. The most natural thought to one making such a will would be that his death fixes the rights of the parties and that "income" would consequently refer to profits made after his death.

For these reasons the Pennsylvania rule (amended to extend the apportionment test to the end as well as the beginning of the life tenancy), seems better than the others now existing, both to effectuate the intention of the testator and to form a standard for doing substantial justice in the adjudication of the conflicting claims of life tenant and remainderman.—St. Louis Law Review.

Substitute for Jury Trials in Civil Cases.—A daily paper recently reported the ruling of a Circuit Judge setting aside a verdict for $25,000 rendered by a jury in favor of an injured employee. The learned judge stated in a memorandum filed with his ruling that he regarded the question of liability for any sum exceedingly dubious at best, and that he granted the motion for a new trial on the ground that the verdict was so excessive as to indicate passion and prejudice on the part of the jury. This ruling is by no means unusual, but what was unusual was that the court, in the course of a written memorandum filed in connection with his ruling, used the following language:

"All of the grave discussion about the effect of instructions on the jury, that they would be misled by this or that, that they would understand this or that to be thus and so, seems rather useless, if not amusing, in view of the common experience that juries are rarely influenced by instructions, if indeed they understand them at all. Instructions framed in phraseology addressed to skilled and trained lawyers are hardly likely to afford much assistance to a common jury."

It may be stated, in this connection, that the judge who made the ruling, and who wrote the memorandum from which the foregoing quotation is taken, is a judge of ripe age, of scholarly attainments,

with not only many years' experience as judge in a trial court, but who has served with distinction as a Justice of the Supreme Court of his state for a number of years.

The statement of this learned and experienced judge (that it is "common experience that juries are rarely influenced by instructions, if indeed they understand them at all") challenges the attention of every citizen who has been taught that this country is governed by law and not by men. Every thinking man knows that the administration of justice is with us the corner-stone of our government, that confidence in the triumph of justice under the law is of the very essence of the society we have organized. If our people lose faith in the administration of justice under the law in this country, they will have lost faith in our form of government. This statement raises the question of the continuance of the jury as an integral part of our system for the administration of justice, so far as it relates to the trial of issues arising out of private differences which occasion the ordinary civil action. For if it be true that a jury in civil cases is rarely influenced by the instructions of the court as to the law of the case, which usually is so involved that it requires trained lawyers to understand and apply it to the facts of a given case, then is the continuance of the system folly.

The jury system is of hoary antiquity. Its history is familiar to all lawyers. A jury consists of twelve men—this because the number twelve was in early ages supposed to possess some magic quality. Because there were twelve guides sent into Canaan to seek and report the truth; twelve prophets to foretell the truth; twelve Apostles to preach the truth; twelve stones upon which the Heavenly Jerusalem was built; therefore, some lawyer wittily said, whenever twelve jurors agreed, the truth was unfolded. The composition has varied from time to time, but the magic number has been retained. At first the jury was entirely composed of witnesses who found the facts upon their own personal knowledge. Later, evidence was allowed to be offered which the jury was at liberty to regard or disregard as it chose. Still later the jury was required to find according to the evidence of witnesses adduced before them, and to be themselves without personal knowledge as to the facts. Finally, the requisite of unanimity in a verdict was abandoned, and today a two-thirds agreement in a civil case is all that is necessary in many States. So that it may be seen that profane hands have already been laid on the jury system.

The system grew up in England at a time when the chief trials were for public offenses, where there were many wicked persecutions by the Crown, and where trials were often presided over by corrupt judges who owed their appointment to the Crown. Naturally the people regarded and called the jury "the palladium and bulwark" of their liberties, and such it was under the monarchial

form of government, as it was the sole barrier to encroachment by the government on the liberties of the people. And today it would be a bold lawyer who would be willing to say that, as to public matters, chiefly criminal cases, in which the public is directly concerned, a section of that public, convened as a jury, should not be called to decide the simple and single question as to the guilt or the innocence of the accused. It is as to *private* matters, as to questions in which the public are not directly concerned, as to the decision of questions of fact out of which private differences between citizens arise, and give rise to civil actions, questions which today are exceedingly complicated and intricate, disputed questions of fact touching which lawyers spend months in gathering pertinent evidence, evidence which requires the jury to analyze, collate, deduce, conclude, which requires them to hear and understand numerous involved propositions of law and their relation to each other and to the facts of the case before them, to listen with discrimination to able contending advocates, after which they are required to retire into the privacy of a jury room and apply the instructions as to the law, which the court has read to them (prepared as a rule by the opposing counsel each with a view to his side of the case alone), to the facts as they find them truthfully to be, and then to pass judgment on the facts according to the law and to render a *vere dictum* —it is to this situation in our times and under our form of government that the utility and efficiency of the jury system in the dispensation of justice is called into question.

It would be interesting to have a scientific psychological study made of the question as to whether it is humanly possible for a body of men, composed as is the ordinary jury, to function as that body is expected to function in the eye of the law. Practically, the writer has no hesitation in stating his conclusion after nearly forty years' active experience with the institution, an ordinary jury in a civil case will ordinarily decide a case according to the law as they conceive the law ought to be, unless their feelings are too much aroused in favor of the under dog in the fight to enable them to consider the law at all in their decision of the case.

A criminal case is a *public* matter, in the decision of which all the *public* are concerned. A difference between two citizens is a *private* matter, in which the public, except so far as providing the means for the peaceful and orderly settlement of such differences, is not concerned. To talk about the jury system as the "buttress of liberty," in this country where the people control the government, and especially in connection with civil cases, is the sheerest nonsense. The resort to the system in civil cases must depend upon its efficiency as an agency in the administration of justice. Is it promotive of justice in the matter of the settlement of private differences? Is a system ethical that drags private differences before

the public, which asks a section of the public to retire into the privacy of a jury room and in secret session decide such differences and then make up a public record for all time of such private differences?

All sorts of suggestions have been made for improving the jury system: how to draw the jury, who is to serve on the jury, how far the judge may go in instructing the jury, whether it shall be permissible to cross-examine the jury by way of special interrogatories as to their verdict, as to whether the requirement as to unanimity shall be discarded. But the fundamental question still remains, Is the system ethical? The tragedy of reforms is that the more you attempt to render ethical an institution which is inherently unethical, the more you postpone the abandonment of such institution. And the tragic situation of lawyers is that they are compelled to practice law according to a legal procedure adopted and demanded by the people, and then are condemned by the people for not squaring their practice of law up to some undefined popular notion of ethics. Does the jury system in civil cases encourage pettifoggers, ambulance chasing, "shystering"? Does it tend to raise the standard of the bar? Does it increase the confidence of the public in the administration of justice in this country? Does it conduce to respect for the law? These are some of the ethical considerations.

There is further an economic side to this question, involving the wastage of human effort, which is important. How many men in this country are annually called from their work to sit on juries—mechanics from their machines, bookkeepers from their accounts, clerks from their desks, farmers from their plows, etc., and what is the direct and indirect pecuniary loss resulting from such interruptions? Does the public understand and appreciate the system which it supports for the administration of "justice"? The coöperation of a keenly alive, intelligent public with the lawyers in their efforts to improve the administration of justice and respect for the law in this country is needed.—Percy Werner in *The Public.*